(1) Supreme Court, U.S.
FILED

No. 03-031105 JAN 29 2004

IN THE

Supreme Court of the United States

IN RE ROBERT E. BROWN, M.D. AND DOROTHY L. BROWN, DEBTORS; ROBERT E. BROWN M.D. AND DOROTHY L. BROWN,

Petitioners,

v.

WALLACE E. TURNER AND JOANN M. TURNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHILE PASSING ON THE EXISTENCE OF AN "INFORMAL PROOF OF CLAIM" AS THAT PHRASE IS USED IN BANKRUPTCY JURISPRUDENCE, DID THE COURT OF APPEALS IN THIS CASE MANAGE TO CREATE A CONFLICT AMONG THE CIRCUITS ON MULTIPLE POINTS OF LAW WITH RESPECT TO THAT DOCTRINE?

2. APART FROM THE CONFLICTS AMONG THE CIRCUITS THAT THE COURT OF APPEALS' DECISION IN THE PRESENT CASE CREATED, DO OTHER CONFLICTS AMONG THE CIRCUITS IN THIS AREA OF LAW REQUIRE RESOLUTION BY THIS COURT?

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Robert E. Brown, M.D. and Dorothy L. Brown respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in *In re Robert E. Brown, M.D.; Dorothy L. Brown, Debtors v. Wallace E. Turner; Joann M. Turner*, No. 02-4137 (Petition for Reargument denied by Order dated November 3, 2003).

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania has not been officially reported. The Opinion and Order filed October 10, 2002 in Civil Action 4:01-CV-01459 appears as Appendix A hereto. The opinion of the United States Court of Appeals for the Third Circuit is also unreported. The panel opinion of September 30, 2003 in Case No. 02-4137 appears as Appendix B hereto. The Court of Appeals' Order denying reargument in its Case No. 02-4137, dated November 3, 2003, appears as Appendix C hereto. The Bankruptcy Court's Order and Opinion, which is also unreported, appears here as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 2003. The Court of Appeals denied a timely petition for reargument by its Order dated November 3, 2003. This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved in this Petition, at least indirectly, is Section 1111 of the Bankruptcy Code, 11 U.S.C. § 1111. That statute appears as Appendix E hereto.

STATEMENT OF THE CASE

On June 14, 1995, the Petitioners ("the Browns") sought bankruptcy protection under Chapter 11 of the Bankruptcy Code, Title 11, United States Code. The Browns were forced to file bankruptcy essentially because of one disputed debt, a debt that they allegedly owe to Wallace and Joanne Turner ("the Turners"), the Respondents herein.

In Illinois, the Browns and Turners had sued one another. The Browns were seeking return of a $5,000.00 deposit they had made on their anticipated purchase of the Turners' house. For various reasons, the Browns' purchase of the property in question was aborted. Paramount in these events was the failure of the State of Illinois to accord Dr. Brown a license to practice medicine in that state by a specified date. The Turners were lying in wait, because they sued the Browns almost immediately afterward. The Illinois Court then consolidated the two cases.

In their suit against the Browns, the Turners (at least theoretically) were seeking "specific performance" *from the buyers, the Browns*, of the contract to purchase the home. After trial in 1993, the Illinois trial court awarded the Turners damages in the amount of $2,224.18. The Turners appealed that decision.

The Illinois Court of Appeals reversed the trial court decision, and remanded the case for a calculation of "equitable damages" in connection with instructions to enter an order for specific performance against the Browns. The Browns filed for bankruptcy prior to the trial court acting on the remand.

On August 8, 1995, the Turners moved for relief from the automatic stay in Bankruptcy Court, so that the Turners could pursue their "specific performance remedies" in the courts of Illinois. In that motion, and in their supporting brief, the Turners averred on numerous occasions that they did not have a "claim" as that term is used in the Bankruptcy Code.

In connection with the Turners' Motion for Relief from the Automatic Stay, the parties entered into a stipulation of facts, with exhibits. That stipulation was filed of record. The parties also submitted briefs to the Court. Again, in their brief in support of their motion for relief from the stay, the Turners repeatedly stated that they did not have a "claim" as that term is used in the Bankruptcy Code.

The Bankruptcy Court issued its decision on the Turners' Motion for Relief from the Automatic Stay on February 28, 1997. With that order and opinion, the Court found that the Turners were not entitled to relief from the automatic stay. More importantly, the Court found that the Turners did have a "claim" as that term is used in the Bankruptcy Code. Continuing from that finding, the Court went on to fashion a formula to determine the amount of the Turners' claim, dependent upon certain actions to be taken with the house, namely its sale. In its February 28, 1997 Order, the Court also required the Browns to pay to the Turners amounts in excess of the initial Illinois trial court judgment, depending

upon the amount for which the Turners' house sold. In response, the Turners filed a motion for equitable damages in which they sought recovery of every conceivable household expense, including cable television bills, from the spring of 1992 forward.

The Browns moved to strike the Turners' motion. The Browns also moved for reconsideration of the Bankruptcy Court's February 28, 1997 Order. With that motion pending, the Turners submitted what purported to be an "amended proof of claim," despite the fact that the Turners had repeatedly contended both in their Motion for Relief from Automatic Stay and in their brief in support thereof, that they did not have a "claim" as that word is used in the Bankruptcy Code. The Browns filed an objection to the Turners' "amended proof of claim."

By Order dated June 2, 1998, the Bankruptcy Court denied the Browns' motion for reconsideration. The Court ordered that the parties were to resolve the amount of the Turners' claim in accordance with the formula set forth in the Court's February 28, 1997 Order, or list the matter for trial. A large part of the Bankruptcy Court's rationale for the June 2, 1998 Order, is the Bankruptcy Court's finding that the Turners had submitted an "informal proof of claim" by virtue of their Motion for Relief from the Automatic Stay.

The parties appealed the February 28, 1997 and June 2, 1998 Orders through the district court and the Court of Appeals. The Court of Appeals held that the appeal was from an order that was not final. It therefore dismissed the appeal and remanded it to the Bankruptcy Court for further proceedings.

The Bankruptcy Court held a hearing after remand. The Bankruptcy Court ordered the Browns to pay the Turners $36,984.44 in satisfaction of the Turners' claim. That hearing was in the Summer of 2001.

The Browns appealed the Bankruptcy Court's Order. By Opinion and Order dated October 10, 2002 (subsequently amended in a manner not relevant to this petition by Order dated October 21, 2002), the United States District Court for the Middle District of Pennsylvania affirmed the Bankruptcy Court. The Browns then appealed that Order to the United States Court of Appeals for the Third Circuit.

At oral argument in August of 2003, the three judge panel of the Court of Appeals literally issued its opinion from the bench. The opinion was reduced to writing by Opinion and Order dated September 30, 2003. The Court of Appeals held that the Turners' motion for relief from stay constituted an "informal proof of claim," despite the fact that the Turners repeatedly stated in that document that they do not have any claim. Given this curious result, the Browns petitioned for reargument. The Court of Appeals denied reargument by its Order dated November 3, 2003.

REASONS FOR GRANTING THE PETITION

ARGUMENT I

WHILE PASSING ON THE EXISTENCE OF AN "INFORMAL PROOF OF CLAIM" AS THAT PHRASE IS USED IN BANKRUPTCY JURISPRUDENCE, THE COURT OF APPEALS IN THIS CASE MANAGED TO CREATE A CONFLICT AMONG THE CIRCUITS ON MULTIPLE POINTS OF LAW WITH RESPECT TO THAT DOCTRINE.

The Court of Appeals' decision in this case is truly unique. Initially, in the Bankruptcy Court, when the Turners contended that they did not have a claim, we argued that they did have a claim in that, no matter how they couched it, they were looking only for money. In making that argument, we relied on this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985). In that case, the State of Ohio had obtained an injunction requiring environmental clean up, and requiring that certain resources be devoted to that endeavor. The defendant in that state proceeding, Mr. Kovacs, ultimately sought bankruptcy protection. When the parties arrived in that forum, Mr. Kovacs argued that, although the State of Ohio had obtained injunctive relief, the state was, for purposes of the bankruptcy, looking only for monetary relief. Therefore, Mr. Kovacs argued, the State of Ohio had a "claim" as that word is used in bankruptcy jurisprudence, and that the State's claim was dischargeable. The Bankruptcy Court, the District Court and the United States Court of Appeals for the Sixth Circuit all agreed with that contention. This Court, after granting Ohio's Petition for a Writ of Certiorari, affirmed the lower courts.

Given the result in the present case, it appears that, here, too, all lower courts agreed with the Browns' initial contention in this regard, a contention that has never changed. Curiously, though, none of the lower courts cited *Kovacs* in any of their opinions.

In any event, with its decision in the present case, the Browns submit that the Third Circuit has created at least two conflicts among the circuits. One is a general type of conflict, and the second conflict revolves around a specific issue.

As of the date that this petition is being initially drafted, our research has disclosed that the various courts of appeal have rendered thirteen published decisions on the issue of informal proof of claim. These decisions have ranged in time from the mid 1980s through late 2002. The requirements for a creditor to file a valid informal proof of claim are similar throughout the United States, although there are some differences among the circuits which we will describe in the following sections.[1]

We recite the cases that the Courts of Appeal have decided to give this Court an illustration of the time period over which they have been decided, and to illustrate the

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1. The requirements that the Court of Appeals articulated in the present case are: 1.) that the document purporting to be an informal proof of claim be in writing, 2.) that the writing contain a demand by the creditor on the debtor's estate, 3.) that the writing express an intent to hold the estate (not the debtor, as the Court of Appeals recited) liable for the debt; 4.) that the document be filed with the bankruptcy court and 5.) based on the particular case, it would be equitable to allow the amendment of the informal proof of claim. See Court of Appeals opinion at 2-3 (citing *In Re McCoy Management Services, Inc.*, 44 BR 215, 217-218 (W.D. Ky. 1984)).

number of circuits that have actually published such a decision prior to the opinion in the present case. The cases are as follows.

In Re International Horizons, Inc., 751 F.2d 1213 (11th Cir 1985); *In Re Sambo's Restaurant, Inc.*, 754 F.2d 811 (9th Cir. 1985); *In the Matter of Pizza of Hawaii, Inc.*, 761 F.2d 374 (9th Cir. 1985); *In Re South Atlantic Financial, Corp.*, 767 F.2d 814 (5th Cir. 1985); *Liakas v. Creditors Committee of Deja Vu, Inc.*, 780 F.2d 176 (1st Cir. 1986); *In Re Haugen Construction Services, Inc.*, 876 F.2d 681 (8th Cir. 1989); *In Re The Charter Company*, 876 F.2d 861 (11th Cir. 1989); *In Re Holm*, 931 F.2d 620 (9th Cir. 1991); *In Re Reliance Equity Inc.*, 966 F.2d 1338 (10th Cir. 1992); *In the Matter of Nikoloutsos*, 199 F.3d 233 (6th Cir. 2000); *In Re M. J. Waterman and Associates, Inc.*, 227 F.3d 604 (6th Cir. 2000) and, finally, *In Re Michaels*, 286 BR 684 (8th Cir., Bankruptcy Appeal Panel 2002).

The general conflict between the decision in the present case and all of the decisions cited above is this: in *absolutely none* of the cases cited above did the creditor file a document (to say nothing of multiple documents, as the Turners have in the present case) denying that the creditor had a claim. Instead, the decisions in the cases cited above turned on what type of document was filed, how clear the creditor's intention to impose liability on the bankruptcy estate was and the extent to which the creditor was able to articulate the existence and nature of its claim. The Court of Appeals' decision in the present case, though purporting to examine most of the factors that the courts in the cases cited above examined, actually turns the analysis on its head and creates the conflict described above: if a creditor is able to deny in multiple documents the notion that it has a claim, what *does* constitute,

as a matter of law, a creditor's intent to hold the bankruptcy estate liable? This is the conflict that this Court must resolve.

The Court of Appeals' decision in the present case also created a second, narrower conflict among the circuits. At pages three and four of its opinion, the Court of Appeals in the present case seems to imply that support for its ruling that the Turners' motion for relief from stay (in which they unequivocally stated more than once that they "do not have a claim") constitutes an informal proof of claim is found in the fact that both the Turners and the Browns believed that the Turners had a claim. But, we are aware of cases from at least two other circuits in which an interested party's mere knowledge of a claim cannot substitute for a creditor's obligation to articulate in a written document its intent to hold the bankruptcy estate liable.

Reported decisions that we believe conflict with the Court of Appeals' opinion in the present case in this respect are *In Re International Horizons, Inc.*, 751 F.2d 1213 (11th Cir. 1985) and *In Re Reliance Equities, Inc*, 966 F.2d 1338 (10th Cir. 1992). In *International*, the Internal Revenue Service had filed proofs of claim for withholding and FUTA taxes. It did not file a proof of claim for corporate income taxes owed by the debtor, although the record had disclosed that the parties discussed that concept extensively and that the Service had issued an assessment against the debtor for back corporate income taxes. Further, the debtor had mentioned the back income taxes in its reorganization plan and provided certain contingencies for those back income taxes, including the intent to litigate that issue. Nonetheless, the Eleventh Circuit held that the Internal Revenue Service did not present a valid informal proof of claim, the Service having missed the bar date to file a claim for the back income taxes. The Eleventh Circuit held that a party's mere

knowledge of a claim is not enough to satisfy the Informal Proof of Claim Doctrine.

The Tenth Circuit reached a similar result in *In Re Reliance Industries, Inc.*, 966 F.2d 1338 (10th Cir. 1992). In that case, the creditor, otherwise failing the necessary requirements for a valid informal proof of claim, attempted to assert that the Trustee's knowledge of the claim alleviated some of the deficiencies with the creditor's documentation. The Tenth Circuit rejected that contention, holding that an interested party's mere knowledge of a claim cannot substitute for all of the requirements necessary for presentation of a valid informal proof of claim.

In the present case, to the extent that the Court of Appeals relied on the premise that the Browns knew that the Turners had a claim and that the Turners knew it (even though they made the specific, strategic choice to not articulate that fact in any court document – and indeed to actively deny the fact in court documents) as part of its rationale for allowing an informal proof of claim, the Court of Appeals' decision in the present case conflicts directly with *International* and *Reliance*.

This is not merely the incorrect application of a properly stated rule of law by the Court of Appeals in this case. It is, instead, an anomalous decision that calls into question what precisely constitutes a creditor's intent to hold a bankruptcy estate liable. In the process, the decision also creates conflict with at least two other Court of Appeals' decisions from other

circuits. We respectfully submit that this alone is sufficient grounds for this Court to grant review.[2]

The next section will address other reasons that we believe it appropriate for the Court to review the present case. These revolve around conflicts that have developed in the circuits over the years with respect to certain aspects of the Informal Proof of Claim Doctrine.

ARGUMENT II

APART FROM THE CONFLICTS AMONG THE CIRCUITS THAT THE COURT OF APPEALS' DECISION IN THE PRESENT CASE CREATED, OTHER CONFLICTS AMONG THE CIRCUITS IN THIS AREA OF LAW DO REQUIRE RESOLUTION BY THIS COURT.

The cases from other circuits that we cited in the previous section span a period of almost twenty years. All of the cases, obviously, address the requirements for a creditor to establish an informal proof of claim within the context of a bankruptcy proceeding. Yet, there are conflicts among the circuits on at least two issues within the rubric of informal proof of claim.

The first conflict manifests itself in the proper standard of review. In the present case, the Court of Appeals did not

2. In all of the lower courts, we argued that § 1111(a) of the Bankruptcy Code foreclosed the Turners from making any sort of claim after the bar date. That statute is reproduced here as an appendix, and we will not take up space in this petition to repeat its provisions here. None of the lower courts addressed that issue, but it would have to be addressed if this Court were to hold that the Turners did not perfect a valid "informal proof of claim."

articulate its standard of review, so we are not entirely sure which standard it applied. We submit that the Court of Appeals decision is incorrect regardless of which standard is used, be it plenary review or a review for abuse of discretion. But, even if this Court accepts that premise as true for the moment, that does not resolve the conflicts that exist among the circuits.

The Eleventh Circuit and the Sixth Circuit review these matters under an abuse of discretion standard. *See In Re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985). *See also In Re M. J. Waterman Associates, Inc.*, 227 F.3d 604, 607-08 (6th Cir. 2000).

Conversely, the Ninth Circuit has held that whether a document constitutes an informal proof of claim is subject to *de novo* review and is a pure question of law. *See In Re Anderson-Walker Industries, Inc.*, 798 F.2d 1285, 1287 (9th Cir. 1986). Further, the Eighth Circuit has left the question of standard of review completely open. *See In Re Michaels*, 286 BR 684, 691 (8th Cir. Bankruptcy Appellate Panel 2002). In sum, we have differing standards of review among the circuits, and we present this in a case in which the Court of Appeals involved here did not even articulate its standard of review. This is an issue that this Court could clarify for the circuits, and we submit that it would be appropriate for this Court to do so.

The circuits have also differed on the precise filing requirements for an informal proof of claim. In *In Re Haugen Construction Services, Inc.*, 876 F.2d 681 (8th Cir. 1989), the Eighth Circuit held that a creditor's correspondence with the bankruptcy trustee, correspondence not actually filed with the bankruptcy court, constituted an informal proof of claim.

The Ninth Circuit reached a similar result in *In Re Anderson-Walker Industries, Inc.*, 798 F.2d 1285 (9th Cir. 1986). Conversely, the Third Circuit Court of Appeals in the present case, along with all of the other circuits that have reported decisions on the Informal Proof of Claim Doctrine (the First, Fifth, Sixth, Tenth and Eleventh Circuits, all in the cases cited in the first section of this petition) require that the documents that a creditor seeks to have deemed an informal proof of claim must be filed with the bankruptcy court itself. Again, we submit that the present case would be an appropriate vehicle for this Court to resolve this conflict among the circuits.

In terms of the manner in which the case reaches this Court, and in terms of the context of the issue, the present case is similar to *Pioneer Investment Services, Co. v. Brunswick Associates Limited Partnership*, 503 U.S. 380, 113 S. Ct. 1389 (1993).[3] In that case, this Court took the opportunity to clarify the doctrine of "excusable neglect" as that phrase is used in deciding whether to allow a creditor to file a late proof of claim. We believe that the present case is similar to *Pioneer* in that the present case presents conflicts among the circuits with respect to proofs of claim filed in a bankruptcy proceeding, just as *Pioneer* did. As was true with *Pioneer*, case law from the circuits has accumulated over a number of years, and there are conflicts within that case law.

The same is true of the present case. With all due respect to the Third Circuit, we submit that its decision in the present

3. In the proceedings below, we addressed *Pioneer* in terms of the impact it had (we believed that it had minimal impact, given the procedural context of our particular case) on the Third Circuit's analysis of § 1111(a) of the Bankruptcy Code and certain controlling precedent within the Third Circuit.

case created a conflict with the decisional law of at least two other circuits, as noted in the first section of this petition. Even apart from the Court of Appeals' decision in the present case, though, there are other conflicts that exist among the circuits with respect to certain facets of the Informal Proof of Claim Doctrine. We addressed those in this section of the petition. Like *Pioneer*, we believe that this case presents this Court a unique opportunity not only to rectify a curious result, but also to eliminate conflicts among the circuits in at least three areas of the Informal Proof of Claim Doctrine, conflicts that have arisen over a period of nearly twenty years. We respectfully submit that the Court should grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and resolve all of these conflicts (significance of a party's knowledge of a claim, the standard of review employed in evaluating the existence of an informal proof of claim and the place where the informal proof of claim needs to be filed) among the circuits.

CONCLUSION

For the reasons stated above, Petitioners Robert E. Brown, M.D. and Dorothy L. Brown respectfully submit that their Petition for Writ of Certiorari should be granted, the writ should issue to the United State Court of Appeals for the Third Circuit, and this Court should thereby review their case.

Respectfully submitted,

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APPENDIX A — JUDGMENT AND BENCH OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 30, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4137

IN RE: ROBERT E. BROWN; DOROTHY L. BROWN,

Debtors

v.

WALLACE E. TURNER; JOANN M. TURNER

Robert E. Brown; Dorothy L. Brown,

Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 01-cv-01459)
District Judge: Honorable John E. Jones, III

Argued September 9, 2003

BEFORE: BARRY, BECKER, and GREENBERG,
Circuit Judges.

JUDGMENT

Appendix A

This case came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on September 9, 2003.

On consideration whereof, it is hereby ADJUDGED and ORDERED by this court that the order of the District Court entered on October 21, 2003, be and the same is hereby AFFIRMED. The mandate to issue forthwith.

ATTEST:

s/ [illegible]
Chief Deputy Clerk

DATED: September 30, 2003

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4137

IN RE: ROBERT E. BROWN; DOROTHY L. BROWN,

Debtors

v.

WALLACE E. TURNER; JOANN M. TURNER

Robert E. Brown; Dorothy L. Brown,

Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 01-cv-01459)
District Judge: Honorable John E. Jones, III

Argued September 9, 2003

BEFORE: BARRY, BECKER, and GREENBERG,
Circuit Judges.

(Filed: September 30, 2003)

BENCH OPINION

Appendix A

Becker, *Circuit Judge.*

Let me begin by commending both Mr. Kodak and Mr. Schweikert on their candor with the Court and their forceful exposition of their clients' claims. However, we have read the opinions of Judge Woodside and Judge McClure and are satisfied that they got it right. The standards which are generally applied by virtually all courts across the land in determining whether a motion for relief from automatic stay satisfies the requisites of an informal proof of claim under the Bankruptcy Code are those stated in *In re McCoy Management Services, Inc.*, 44 B.R. 215 (B.R. W.D. Ky. 1984):

> courts have interpreted the Bankruptcy Code and the Bankruptcy Rule to require five elements in order for an informal proof of claim to be valid and amendable:
>
> (1) the proof of claim must be in writing;
>
> (2) the writing must contain a demand by the creditor on the debtor's estate;
>
> (3) the writing must express an intent to hold the debtor liable for the debt;
>
> (4) the proof of claim must be filed with the Bankruptcy Court; and
>
> (5) based on the facts of the case, it would be equitable to allow the amendment.

> These requirements are not stricti juris in the sense that any minor deviation will be fatal to the claim. They merely state broad general guidelines, judicially formulated, which must be followed if a claim is to be allowed.

Id. at 217-18. We too will apply them.

I will not take the time to recite the facts and procedural history—the tortuous facts and long procedural history of this unfortunate case, which deserves at this late date to be disposed of quickly. The panel is satisfied that no valid purpose would be served to taking this matter under advisement and writing a lengthy opinion. We are satisifed that the motion for relief from automatic stay, which is found at the Appendix, pages 16A-18A, does meet the *McCoy* requirements—it is in writing; it contains a demand by the creditor on the debtor's estate; it expresses an intent to hold the debtor liable for the debt; it has been filed with the Bankruptcy Court; and we feel that it would be equitable to allow the amendment.

Mr. Kodak has very forcefully argued that the Turners have in effect abjured proceeding under the Bankruptcy Code and have in effect forfeited their right to contend that they have a valid informal proof of claim by stating that "they don't have a claim." However, we are satisfied that that statement is a function of the rather unusual Illinois statute and procedures which give the disappointed *seller* the right to claim some kind of equitable damages against the buyer who does not fulfill a contract for sale of real estate. We do not see the Turners having announced or telegraphed that they do not have a claim. Indeed the history of this litigation

suggests that they have and that they have long felt that they do. We are satisfied that there was an informal proof of claim filed here. Judge McClure in his opinion affirming Judge Woodside's order was satisfied that there was a valid informal proof of claim filed here, and we are satisfied that both Judge Woodside and Judge McClure were correct. The notice of appeal is from the order entered October 21, 2001. That order will be affirmed and this bench opinion will be transcribed and constitute the opinion and judgment of the Court. The formal judgment of the Court will follow. I simply want to add that Judge McClure's order concludes:

> We agree with the Bankruptcy Court that the motion for relief from the stay constitutes an informal proof of claim subject to amendment after the claims bar date since attorneys properly amended their proof of claim, the claim is not barred.

We announce our endorsement of that. Judge Barry, anything to add?

Judge Barry: I would simply add as Judge Becker noted that the final order in this case was not Judge McClure's but was entered by the Honorable John E. Jones, III.

Judge Becker: Yes, of course, it was Judge Jones. Judge McClure did the opinion, but the order was done by Judge Jones.

Judge Barry: The attorneys have argued this very, very capably and we thank them for that.

/s/ Edward R. Becker
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED OCTOBER 10, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BANKRUPTCY NO: 1-95-01144
CHAPTER 11

IN RE:

ROBERT E. BROWN AND DOROTHY L. BROWN,

Debtors

DOCKET NO. 4:01-CV-01459
(Judge Jones)

WALLACE E. TURNER AND JOANN M. TURNER,

Movants

v.

ROBERT E. BROWN AND DOROTHY L. BROWN,

Respondents

ORDER

October 10, 2002

Appendix B

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Before us is an appeal of an order entered by this District's late bankruptcy Chief Judge Robert Woodside. This action commenced as a result of a real estate transaction. In 1992 the Turners (Movants) agreed to sell their Illinois home to the Browns (Debtors). The Debtors reneged on the sales agreement which prompted an Illinois court to award a judgment in favor of Movants for specific performance. On June 14, 1995 the Debtors filed a chapter 11 bankruptcy in the United States Bankruptcy Court for the Middle District of Pennsylvania.

Movants filed a motion for relief from the automatic stay in order to compel the specific performance sale of their home. Judge Woodside entered an order finding that the motion for relief from the stay constituted an informal proof of claim on the part of the Movants. The Debtors appealed the order to the District Court. On November 25, 1998, Judge James McClure, of this court, entered an order affirming the bankruptcy court's finding and remanding the matter back to bankruptcy court for further proceeding.

On February 28,1997, Judge Woodside entered an order reducing Movants' judgment to one for money damages and directed that the damages be calculated based upon the sale of Movants' house. Thereafter, the property was sold to a third party, and on June 25, 2001, Judge Woodside entered an order in which he ordered the Debtors to pay the Movant's the calculated damage sum of $36,984.44. On August 1, 2001 Debtors filed an appeal of this order. The appropriate briefs

were filed and this matter has been ready for disposition since August 30, 2001. On August 6, 2002, Judge McClure issued an order which transferred responsibility for this appeal to the undersigned.

It is apparent from our considerations of the briefs that the Debtors have simply resurrected the argument that the Movants have not filed a proper proof of claim, as previously made to Judge McClure in 1998.

Debtors' current appeal does not attack any of the factual findings contained in Judge Woodside's order. Debtors simply return to the argument that Movants failed to file a formal proof of claim which either bars or greatly restricts their ability to recover damages.

We affirm Judge Woodside's order based the law of the case doctrine. "Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. Law of the case directs a court's discretion, it does not limit the tribunal power." *Arizona v. California*, 460 U.S. 605, 618 (1983). "The law of the case doctrine expresses the practice of courts generally to refuse to reopen what has been decided. Law of the case restrictions apply to subsequent rulings by the same judge in the same case or a closely related one. Although a trial judge has the power to reconsider an earlier decision, its authority to do so is limited by two prudential considerations: First, the court must explain on the record the reasoning behind its decision to reconsider

the prior ruling. Second, the court must take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." *In re RBGSC Investment corporation*, 253 B.R. 352 citing *Raquel v. Education Management Corp.*, 196 F.3d 171, 183 (3d Cir. 1999)(internal citations omitted).

Simply stated, Judge Woodside and Judge McClure, of this court, have already determined the issue of whether Movants filed a proper proof of claim. We will not review an issue which has already been decided in this case. In particular it is inappropriate for this Court to disrupt and reconsider the learned analysis and conclusions of the two distinguished jurists, who in effect plowed this same field before our opportunity to do so.

We are therefore exercising our discretion under the law of the case doctrine.

ACCORDINGLY, WE ENTER THE FOLLOWING ORDER:

1. Judge Woodside's order of June 25, 2001 is affirmed.

2. This case is remanded back to the bankruptcy court for further proceedings consistent with this order.

3. The Clerk of Court is directed to close this file.

s/ John E. Jones III
John E. Jones III
United States District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED JUNE 25, 2001

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No.: 1-95-01144

Chapter 11

IN RE:

ROBERT E. BROWN AND DOROTHY L. BROWN,

Debtors

WALLACE E. TURNER AND JOANN M. TURNER,

Movants

v.

ROBERT E. BROWN AND DOROTHY L. BROWN,

Respondents

MEMORANDUM

Procedural and Factual History

Appendix C

In March, 1992, Wallace E. and Joann M. Turner (Movants) agreed to sell their Illinois home to Robert E. and Dorothy L. Brown (Debtors) for $317,500.00 on June 9, 1992. Shortly before the closing date, Debtors reneged on their offer. Debtors then sued Movants in state court to recover their down payment. Movants countersued for specific performance. After some lengthy litigation, Movants obtained judgment.

Prior to the date for the court-ordered closing on the home, Debtors filed in Chapter 11. Another lengthy period of litigation followed as Movants attempted to prevent Debtors from altering through this Court the specific performance order. On February 28, 1997, I issued an Order to reduce Movants' judgment to one for money damages. My Order compelled Movants to sell their home under certain conditions and then to file a Motion for damages. In March, 1997, the home was sold for $285,000.00. The Movants then filed a Motion for payment of damages as prescribed. A hearing was held on that Motion, and the matter is now ready for decision.

I have jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334. To the extent that it is a determination of the amount and validity of a claim, this matter is core in nature pursuant to 28 U.S.C. §157(b)(2)(B). To the extent that it is a decision on the merits of a contractual dispute that may have some impact on the bankruptcy estate, it is non-core but related to the bankruptcy case. *See, In re Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Neither party has objected to my jurisdiction to make a final decision on the merits, and thereby they have impliedly consented to

entry of final judgment by this Court. *See*, *In re M.A. Baheth Construction Co.*, 118 F.3d 1082 (5th Cir. 1987), *cert. denied*, 522 U.S. 1092 (1997); *Abramowitz v. Palmer*, 999 F.2d 1274 (8th Cir. 1993).

Discussion

My February 28, 1998 Order stated that damages were to be awarded in the following categories: (1) the difference between the selling price and $317,500.00; (2) liquidated damages of $2,224.18 as initially ordered by the Illinois state court; (3) incidental damages to be specifically pleaded and proven in a subsequent proceeding. As there is little dispute regarding the first two categories of damages, the Movants shall be awarded $32,500.00 - the difference between the actual selling price for the house and the contract price with the Debtors. Movants shall also be awarded the amount of $2,224.18 in accordance with the initial Illinois proceeding.

In support of their case for damages in the third category, the Movants' cite *First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Association of Morristown*, 610 F.2d 164, 174 (3rd Cir. 1979) for the proposition that damages should be calculated so as to put them in the same position they would have occupied had the Debtors not breached their promise. While I generally agree with this proposition, I must note that Movants' case involves an Illinois land transaction and an Illinois sales contract which is governed by Illinois law. Therefore, I must be guided in the instant decision by Illinois law. *See*, *In re Fineberg*, 202 B.R. 206 (Bankr.E.D.Pa. 1996), (when laws of two states may apply to parties' contract dispute, court looks to conflicts

of law rules of the jurisdiction in which it sits. Pennsylvania courts apply the law of the state with the most significant relationship to the contract in dispute.)

In breach of contract actions under Illinois law, a monetary award of damages should, to the extent possible, put the non-breaching party in the position he would have been in had the contract been performed. *Naiditch v. Shaf Home Builders, Inc.*, 160 Ill.App.3d 245, 267, 512 N.E.2d 1027 (1987). "[T]he plaintiff bears the burden of proving that he or she sustained damages resulting from the breach and establishing both the correct measurement of damages and the final computation of damages based on that measurement." *Olivier v. Alden*, 634 N.E.2nd 418 (1994), *citing*, *First National Bank v. Dusold* 180 Ill.App.3d 714, 718, 536 N.E.2d 100 (1989). A plaintiff to a breach of contract action is not entitled to a windfall. *Kalal v. Goldblatt Brothers, Inc.*, 53 Ill.App.3d 109, 112, 368 N.E.2d 671 (1977).

Under Illinois law, when a buyer breaches a contract to purchase real estate,

> a proper measure of the element of damages for the real estate itself is the difference between the contract price and the market price on the date of the breach. However, there is nothing . . . to suggest that this is the only element of damages. The general rule on contract damages is that they are recoverable as they may fairly and reasonably be considered to have arisen naturally from the breach of the contract itself, or such as may reasonably be

> supposed to have been in the contemplation of the parties as they made the contract.

Sheppard v. Fagan, 418 N.E.2d 876 (Ill.App. 1Dist. 1981); *see also*, *Crown Life Ins. Co. v. American Nat. Bank and Trust Co. of Chicago*, 830 F.Supp. 1097 (N.D.Ill. 1993).

Movants herein request damages for expenses incurred in hunting a new residence. I find such damages to have arisen naturally from Debtors' breach of promise. Movants request damages of $560.48[1] in travel-related expenses, e.g. airline fares, car rental, gasoline, etc., for trips that they took to find a new home on the East coast, in reliance on the Debtors' promise to purchase their house. I find the amount requested more than reasonable.[2] An order will be entered requiring payment in this amount.

Movants also seek damages for certain ordinary household expenses (i.e. insurance, mortgage interest, taxes, and home maintenance) that they incurred by having to remain at the Illinois home. Movants aver that they would not have incurred such expenses for the Illinois home if Debtors had purchased the house as agreed. On its face, this averment

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1. Movants' exhibit which summarizes and totals their damages actually shows total travel expenses of only $430.48. However, there appears to have been a miscalculation in this total, as it does not include an expense of $130.00 for ten days airport parking.

2. Eight flights from Chicago to various East coast destinations cost the Movants only a total of $168.30. Movant Wallace Turner is a retired airline pilot who receives substantial discounts on airfares as a result of his previous employment.

appears sound, but it is untenable as a basis *by which to calculate damages* because it is based on the false premise that they would have incurred no ordinary household expenses themselves, at another home, if Debtors had purchased the house.

Movants intended to move to an apartment in Syracuse, New York, if the sale to Debtors had been consummated. Of course, Movants might reasonably assert that, at an apartment, their utility and maintenance expenses would have been smaller than those of their "upscale" Illinois home. However, Movants' claim for damages neither takes into account nor proves the expenses they would have incurred at an apartment. While Movants could reasonably assert that Debtors are responsible for the *difference* between what they would have paid at an apartment and what they did pay at the Illinois home, without any proof whatsoever of how much they would have spent on living expenses at a Syracuse apartment, I cannot calculate damages. Thus Movants have failed to sustain their burden of proof as to such damages.

Movants next request reimbursement of moving expenses in the amount of $1,699.78. While the move did not actually occur, it appears that reasonable expenses were incurred for the packing of household items and the rental of a truck. Thus, this expense will also be allowed.

Movants also request damages for "Losses Incurred in Replacing Items Disposed of in Anticipation of Settlement and Move." These damages are based on the Movants' having, in reliance on Debtors' promise, sold or given away certain personalty (lawn mowers, living and dining room furniture, small appliances and decorations) which they

would not need at their new residence, and then having replaced them when the Debtors reneged on closing.

Movants' theory of recovery is basically sound, but again, their proof is incomplete. It was reasonable for Movants to sell or give away unneeded home furnishings in reliance on Debtors' promise to purchase. It was reasonable for them to replace those items after the deal fell through. However, it would appear to be a pure windfall to Movants if Debtors should be responsible for the replacement cost (as Movants request) rather than for the estimated value of the items sold or given away. Movants offer no cases to support their position on this issue, and I have found none that would do so.

In addition, there is no evidence of what happened to the new, replacement items after Movants finally sold the house. Were those items sold? If so, what did Movants get for them? Were they sold with the house? If so, what was the value attached to them? Like with Movants ordinary household expenses, Debtors would only be liable for the *difference* between the replacement cost and the resale price. Again, since Movants present no evidence on this issue, they fail to carry their burden of proof. *See*, *Bowman v. Zinny*, 256 Ill.App.3rd 386, 628 N.E. 2nd 384 (1993) ("damages cannot be based on mere speculation or conjecture.") Therefore, damages will be denied in this category as well.

Finally, Movants demand the inclusion of pre-judgment interest on their claim. On the subject of pre-judgment interest on a claim for breach of contract, Illinois law provides that judgment creditors shall be allowed to receive interest at an annualized rate of 5% for all moneys after they become due

"on any bond, bill, promissory note, or other instrument of writing". *Cushman & Wakefield of Ill., Inc. v. Northbrook 500 Ltd. Partnership*, 112 Ill.App.3d 951, 445 N.E.2d 1313 (1983); *citing*, Ill.Rev.Stat. 1981 Ch. 17, para. 6402.[3]

It is not clear that a real estate contract meets the statutory requirement for an "instrument of writing". *Spagat v. Schak*, 130 Ill.App.3rd 130, 473 N.E.2d 988 (1985); but *see*, *Cummings v. Beaton & Associates, Inc.*, 249 Ill.App.3rd 287, 618 N.E.2d 292 (1992). Regardless, in order to invoke the pre-judgment interest statute, "the amount due [must] be a fixed or easily ascertainable amount. . . ." *Cushman*, 445 N.E. at 1321; *see also*, *Stevenson v. ITT Harper, Inc.*, 51 Ill.App.3d 568, 366 N.E.2d 561 (1977); *Kansas Quality Construction, Inc. v. Chiasson*, 112 Ill.App.2d 277, 250 N.E.2d 785 (1969). Prejudgment interest is not allowed on unliquidated claims even if the claim is based on an instrument of writing. *Spagat*, at 994. Damages ascertainable by computing the difference between the contract price and the fair market value of the property are sufficiently liquidated to base prejudgment interest unless, at the time of the breach, said market value was disputable. *Farwell Construction Co. v. Ticktin*, 84 Ill.App.3d 791, 405 N.E.2d 1051 (1980).

In the instant case, the market value of the property on the date of the breach was clearly disputable. Movants' inability to sell the home for several years post-breach is evidence enough of that. Therefore, pre-judgment interest is not allowable under Illinois law.

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3. This statute is currently cited at IL.ST.CH. 815 §205/2.

Appendix C

For the above-discussed reasons, damages will be assessed against the Debtors in the amount of $36,984.44. These damages constitute a non-dischargeable debt payable through Debtors' plan of reorganization. All debts have been paid through that plan already. The plan proposes immediate and full payment to all unsecured creditors. Movants are entitled to the same treatment as all other unsecured creditors. Therefore, Debtors will be ordered to immediately pay to the Movants the sum of $36,984.44.

An Order implementing these conclusions is attached.

BY THE COURT

s/ Robert J. Woodside
ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE

HARRISBURG, PENNSYLVANIA

Appendix C

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No.: 1-95-01144

Chapter 11

IN RE:

ROBERT E. BROWN AND DOROTHY L. BROWN,

Debtors

WALLACE E. TURNER AND JOANN M. TURNER,

Movants

v.

ROBERT E. BROWN AND DOROTHY L. BROWN,

Respondents

ORDER

AND NOW, this 25th day of June, 2001, Debtors are hereby ordered to pay to the Movants, within thirty days, the sum of $36,984.44.

Appendix C

BY THE COURT

s/ Robert J. Woodside
ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE

HARRISBURG, PENNSYLVANIA

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED NOVEMBER 3, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4137

IN RE: ROBERT E. BROWN, M.D.; DOROTHY L. BROWN,

Debtors

v.

WALLACE E. TURNER; JOANN M. TURNER

Robert E. Brown; Dorothy L. Brown,

Appellants

BEFORE: BARRY, BECKER, and GREENBERG,
Circuit Judges.

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

Appendix D

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: November 3, 2003

APPENDIX E — STATUTE INVOLVED

11 U.S.C. § 1111

§ 1111 Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

Supreme Court, U.S.
FILED
FEB 27 2004
OFFICE OF THE CLERK

No. 03-1105

IN THE

Supreme Court of the United States

ROBERT E. BROWN, *et ux.*,

Petitioners,

v.

WALLACE E. TURNER, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE CASE[1]

Although this Court's resolution of whether to grant the Petitioners' (hereinafter "the Browns") Petition for Writ of Certiorari does not turn solely upon its consideration of factual matters, the Respondents (hereinafter "the Turners") are compelled to present a counter-statement of the case in order to clarify those facts set forth in the Browns' Statement of the Case.

On March 17, 1992, the Turners entered into a real estate sales contract with the Browns for the sale of certain property located at 11837 Oak Lane, Zion, Lake County, Illinois. The property had been originally listed for sale at Three Hundred Thirty Thousand ($330,000.00) dollars. The agreement called for a price of Three Hundred Seventeen Thousand Five Hundred ($317,500.00) dollars. Closing date was set for June 9, 1992. Thereafter, the Browns refused to close on the property. On or about June 20, 1992, the Browns signed a contract and purchased a different house.

On June 24, 1992, the Browns sued the Turners, alleging a refusal to cancel the contract and honor the contingency for the medical license. In response, the Turners filed suit against the Browns on July 1, 1992, alleging breach of contract and requesting specific performance. The two suits were consolidated and trial was held in the Circuit Court of the 19th Judicial Circuit of Illinois in Lake County.

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1. The Turners respectfully submit that the Statement of the Case presented in the Petitioners' Petition for Writ of Certiorari includes much more "argument" than "fact" (e.g., "The Turners were lying in wait . . ." Petition for Writ at 2), and many "facts" not of record (e.g., the facts surrounding the Turners' return to Pennsylvania), all of which should be disregarded by this Honorable Court. *Petition for Writ* at 2.

In a judgment issued August 12, 1993, the trial court in Illinois found that the Browns had waived the contingency clause and had breached the contract. The trial court, however, denied the Turners' request for specific performance and entered a judgment for damages. The Turners appealed.

On November 8, 1994, the Second District Appellate Court of Illinois reversed in part, vacated in part and remanded the case. After finding that the trial court abused its discretion in not awarding specific performance, the Illinois appellate court vacated the award of damages and remanded the case to the trial court. Neither the Turners nor the Browns appealed the decision of the Illinois appellate court.

As a result of the appellate court's order, on April 17, 1995, the Illinois trial court entered a new decision against the Browns, ordering specific performance and setting closing for May 17, 1995. Instead of complying with that order, on June 14, 1995, the Browns filed for bankruptcy protection in the Middle District Court of Pennsylvania, where they were then residing. On August 8, 1995, the Turners filed a Motion for Relief from the Automatic Stay, seeking enforcement of the specific performance order. Subsequently, the Bankruptcy Court entered an Order of February 28, 1997, denying the Motion for Relief from Automatic Stay, but directing sale of the property, and assessment of damages against the Debtors.

The Turners then filed a proof of claim. The Browns objected, contending it was untimely. The Bankruptcy Court overruled their objections and, later, denied reconsideration. On November 25, 1998, the United States District Court for the Middle District of Pennsylvania affirmed the orders entered by the Bankruptcy Court. The Browns appealed to

the Third Circuit Court of Appeals and the Third Circuit dismissed the appeal for lack of jurisdiction and remanded the case back to the Bankruptcy Court for entry of a final order.

Upon remand, the Bankruptcy Court held a hearing and entered an order fixing the Turners' damages at $36,984.44. *Petition for Writ*, App. C, p. 11a. Again, the Browns appealed to the District Court. Again, Judge Jones' October 10, 2002, Order affirmed the Bankruptcy Court's ruling. *Petition for Writ*, App. B, p. 7a. On September 30, 2003, a three-judge panel of the Third Circuit Court of Appeals ruled in the Turners' favor, upholding the decisions of the Bankruptcy Court and the District Court. *Petition for Writ*, App. A, p. 3a. Subsequently, the Browns petitioned to the Third Circuit for a Panel Rehearing. On November 3, 2003, the Third Circuit denied this request. *Petition for Writ*, App. D, p. 22a. The Browns pressed on with the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

A. The Third Circuits' decision in this case did not create a conflict among the Federal Circuit Courts as to what constitutes an informal proof of claim.

Initially, the Browns argue in their Petition for Writ of Certiorari (hereinafter the "Petition") that the Third Circuit, District Court and Bankruptcy Court all held that the Turners had a claim cognizable in bankruptcy. The Browns cite this Court's opinion in *Ohio v. Kovacs*, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985) as analogous to this case. In *Kovacs*, this Court ruled on the *existence of a claim* in bankruptcy and whether that claim was dischargeable.

That is not the case here. The Bankruptcy Court ruled long ago that the Turners had a "claim" in the Browns' bankruptcy proceeding. The issue that Petitioners seek this Court to review has been before the bankruptcy court twice, the United States District Court twice and the Third Circuit twice. To wit, did the Turners present a document to the bankruptcy court that is properly classified as an informal proof of claim? The aforementioned lower courts have each (twice) made the same ruling: yes.

The Browns' contention that a conflict was created by the Third Circuit Court of Appeals decision in this case is unique. The Browns cite a multitude of cases in which the circuit courts have ruled on the existence or nonexistence of an informal proof of claim in a bankruptcy proceeding. None of the Browns' cases are directly on point with the case at bar, in which the Turners initially argued that they did not have a "claim" within the Browns bankruptcy proceeding and later used their Motion for Relief from the Automatic Stay as an informal proof of claim. The Browns ignore case law that is on point. A motion for relief from the automatic stay can constitute an informal proof of claim. *See In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. Hawaii 1985). In some cases, courts have held that action in as casual a form as a letter notifying the Trustee of a debt of the estate may constitute an informal proof of claim, or the constructive filing of a proof of claim. *See In re Anderson-Walker Industries, Inc.*, 798 F.2d 1285 (9th Cir. Cal. 1986); *In re Butterworth*, 50 Bankr. 320 (W.D. Mich. 1984).

As is reflected in the initial pleadings in this case, the Turners had initially sought equitable relief against the Browns, relying upon cases holding that such relief did not constitute a claim, *per se*, against the debtor.

See Roxse Homes, Inc. v. Roxse Homes Ltd. Partnership, 83 B.R. 185-189 (D. Mass.), *aff'd*, 860 F.2d 1072 (1st Cir. Mass. 1988). *See also*, *In re Pribonic*, 70 B.R. 596 (Bankr. W.D. Pa. 1987). The Turners made this argument in good faith, as they were attempting to enforce a specific performance order from an Illinois court. After the bankruptcy court ruled that the Turners did, in fact, have a "claim" in bankruptcy, the Turners filed an amended proof of claim – asserting their Motion for Relief from the Automatic Stay as an informal proof of claim. The Browns challenged this ruling at every level of judicial review. At every level, their challenge failed.

The Browns' reference to the Turners' initial argument, nearly ten (10) years ago, that they did not have a "claim" within the Browns' bankruptcy proceeding is a classic red herring. The bankruptcy court resolved this issue years ago, holding that the Turners did, in fact, have a claim in bankruptcy. The Browns never appealed this ruling. Instead, the Browns appealed the bankruptcy court's ruling that the Turners' Motion for Relief from the Automatic Stay constituted an informal proof of claim.

The seminal standard for determining the existence of an informal proof of claim, and the standard utilized by the Third Circuit in this case, is found in *In re McCoy Management Services, Inc.*, 44 B.R. 215 (Bankr. W.D. Ky. 1984). The test involves a review of the following: (1) the proof of claim must be in writing; (2) the writing must contain a demand by the creditor on the debtor's estate; (3) the writing must express an intent to hold the debtor liable for the debt; (4) the proof of claim must be filed with the Bankruptcy Court; and (5) based on the facts of the case, it would be equitable to allow the amendment.

McCoy Management, *supra*, at 217. The touchstone of the *McCoy* factors is that this is a *factual inquiry* – an inquiry that is left to the discretion of the individual judge making a ruling. The Browns attempt to characterize each lower courts' ruling using this standard as creating a conflict among the circuit courts. Therefore, the Browns reason, this Court should endeavor to set forth the "law of the land" with regard to informal proofs of claim.

What the Browns ignore is that there can be no hard and fast rule when a factual inquiry is involved. It is well-settled that the law recognizes informal proofs of claim. It is equally clear that evaluations of actions proffered as informal proofs must include *ad hoc* reviews of the particular actions in questions. It is simple logic, then, to see that such *ad hoc* evaluations do not – and cannot – allow for the one-size-fits-all definition that the Browns are implicitly promoting. There is no "conflict" among the circuit courts on this issue. There are only different resolutions of the "informal proof of claim" issue, arising from a host of different and distinctive factual underpinnings. Each lower court that heard this case determined, properly, that the Turners did, in fact, present an informal proof of claim within their Motion for Relief from Automatic Stay. Similarly, each court cited in the Browns' Petition, as well as those set forth above, analyzed the facts of the individual case and made a determination.

The Browns note in their Petition that this Court should agree to hear this case to resolve the following conflict:

> [i]f a creditor is able to deny in multiple documents the notion that it has a claim, what *does* constitute, as a matter of law, a creditor's intent to hold the bankruptcy estate liable?

Petition for Writ at 8. The answer is simple: apply the *In re McCoy* factors to the facts of the case in question. This is not a conflict of laws issue among the circuits. This is a case in which courts reviewed the facts of *this* case and *each* ruled that the Turners had, in fact, presented an informal proof of claim, allowable under the bankruptcy laws.

After reviewing the relevant facts and pleadings it had to consider, the Third Circuit ruled that the Turners had, in fact, presented an informal proof of claim (affirming the Bankruptcy Court and the United States District Court for the Middle District of Pennsylvania). *Petition for Writ*, App. A, p. 5a. This ruling does not, as the Browns argue, create a conflict of law issue amongst the Circuit Courts. In fact, it follows the analyses utilized by the Circuit Courts. Here, factually, the Turners did present an informal proof of claim. Analyzing a different set of facts, the Third Circuit – as well as the bankruptcy court and the district court, for that matter – could have ruled that the Turners did not present an informal proof of claim.

B. The Third Circuit's failure to set forth a standard of review does not create a conflict that warrants review by this Court.

The Browns assert that the Third Circuit did not articulate its standard of review in its opinion. A simple review of the Third Circuit's opinion makes clear the standard it applied in this case:

> [I] will not take the time to recite the facts and procedural history – the tortuous facts and long procedural history of this unfortunate case, which deserves at this late date to be disposed of quickly.

> The panel is satisfied that no valid purpose would be served to taking this matter under advisement and writing a lengthy opinion. We are satisfied that the motion for relief from automatic stay . . . does meet the *McCoy* requirements. . . .

Petition for Writ, at Appendix A, 5a. Clearly, the Third Circuit panel exercised the exact plenary review of this case that the Browns had requested in their Brief to the Circuit Court. *Brief for Appellants to the Third Circuit Court of Appeals*, at 7. The Browns' argument that it is unclear what standard of review the Third Circuit used is tenuous, at best, and specious, at worst.

Finally, under the auspices of a conflict among the circuits as to the appropriate standard of review, the Browns also argue that some circuits apply the *abuse of discretion* standard to matters of this type, while other circuits apply plenary review. The Browns' assertion that this creates a conflict appropriate for this Court's review is misplaced. In a case such as this, where the Third Circuit was asked to determine whether the Turners' filed an informal proof of claim, it is irrelevant which standard of review the Court applied. The results are the same. If the Court applied plenary review, it must review the facts as applied to the law, *de novo*. Utilizing an abuse of discretion standard, the Third Circuit must enter into the same inquiry – did the lower courts apply the facts correctly to the law? Either way, the Third Circuit makes the same inquiry: Is there sufficient evidence that, here, the Turners presented an informal proof of claim to the bankruptcy court?

This is not a matter properly before this Court. This is simply a case of the Petitioners' continued efforts to postpone

the inevitable: their compliance with a court order to pay the Turners money. This Court should not permit the Browns to twist and manipulate the facts of this case into a matter for its consideration.

CONCLUSION

For the foregoing reasons, the Respondents, Wallace E. Turner and Joann M. Turner, respectfully request that this Court deny the Browns' Petition for Writ of Certiorari.

Respectfully submitted,

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